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2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 09-50026-reg

6 | In the Matter of:

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8 MOTORS LIQUIDATION COMPANY, et al.,

9 f/k/a General Motors Corporation, et al.,

10

11 | Debtors.

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14

15 U.S. Bankruptcy Court

16 | One Bowling Green

17 New York, New York

18

19 July 28, 2011

20 12 : 03 PM

21

22 | B E F O R E :

23 HON. ROBERT E. GERBER

24 U.S. BANKRUPTCY JUDGE

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2 **Telephonic Hearing re: Motion to File Proof of Claim After**
3 **Claims Bar Date by Judd Wiesjahn and Annalisa Sand**

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24 **Transcribed by: Hana Copperman**

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2 THE GARDEN CITY GROUP

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6 BY: ANGELA FERRANTE (TELEPHONICALLY)

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1 P R O C E E D I N G S

2 THE COURT: Hello. This is Robert Gerber. We have an
3 on the record call in Motors Liquidation. Who do I have on the
4 phone?

5 MR. GEILIM: Yes. My name is Gilbert Geilim. I'm an
6 attorney in California, and I am appearing for Mr. Martin
7 Stanley.

8 THE COURT: I'm sorry. I couldn't hear your name,
9 sir.

10 MR. GEILIM: Gilbert. Last name Geilim.

11 THE COURT: Your last name again, please?

12 MR. GEILIM: G-E-I-L-I-M.

13 THE COURT: Geilim?

14 MR. GEILIM: Right.

15 THE COURT: All right, Mr. Geilim.

16 MR. SMOLINSKY: Good afternoon, Your Honor. Joe
17 Smolinsky from Weil, Gotshal & Manges for the debtors.

18 THE COURT: All right, Mr. Smolinsky. Anyone else?

19 MS. FERRANTE: Angela Ferrante from The Garden City
20 Group.

21 THE COURT: All right. Thank you.

22 MS. BENFIELD: And this is Brianna Benfield, also from
23 Weil, Gotshal & Manges.

24 THE COURT: Okay. Ladies and gentlemen, I found all
25 three witnesses credible, and though the matter is close I'm

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1 finding as a fact that Mr. Stanley did not get actual notice of
2 the bar date in time to respond to it in a timely manner.

3 I further find as a fact, or as a mixed question of
4 fact and law, that his motion to file the late claim was not
5 unreasonably sluggish after he learned of the need to do so,
6 and as a mixed question of fact and law I determine that Motors
7 Liquidation's most legitimate concern and defense, that of
8 opening the floodgates to the many other late claims, shouldn't
9 be that big a concern, because the facts here are, as Mr.
10 Stanley argues, a perfect storm reflecting a confluence of
11 facts that are unlikely to be duplicated again in my judicial
12 lifetime.

13 The starting point for my findings is my personally
14 eyeballing Mr. Stanley and Mr. Lamb and gauging their demeanor.
15 Their testimony was credible. I don't believe that either
16 timely saw the bar date notice. Each spoke directly and
17 without hesitation on the matters relating to receipt. Mr.
18 Lamb seemed to be choosing his words very carefully on whether
19 there had been other instances of late filing, though not on
20 matters involving a bar date or statute of limitations, but
21 this was not the issue, and I'm inclined to think Mr. Lamb did
22 so to take pains to be truthful on a matter that might
23 potentially be embarrassing but wasn't really the point.

24 While I've considered the possibility that one or more
25 bar date packages came into their office and didn't get opened

1 or read I think the likelihood of that is diminished as a
2 consequence of the small size of their office and the testimony
3 we heard about reviewing the incoming mail together.

4 Then, of course, I must consider the ways by which the
5 mail was addressed. Motors Liquidation points out,
6 appropriately, that about forty mailings were addressed to some
7 variance of 137 Bay Street, Unit #2, Santa Monica, California,
8 and only three were returned as undeliverable. But we also
9 know that three notices of the bar date addressed to 137 Bay
10 Street, Unit #2 but with Wiesjahn, Rachel and Sand, Annalisa,
11 Wiesjahn, Rachel and Wiesjahn, Judd, and Wiesjahn, Rachel
12 appearing twice were returned as undeliverable. This suggests
13 that sending it to 137 Bay Street, Unit #2 wasn't enough to
14 necessarily ensure delivery to that address. We also know that
15 three more mailings addressed identically were neither returned
16 as undeliverable nor, according to the testimony of Mr. Stanley
17 and Mr. Lamb, received.

18 That cuts two ways. While that could, of course, be
19 argued as undercutting their credibility it also calls into
20 question the consistency of the U.S. Postal Service in sending
21 back mail that may not have been delivered. If three mailings
22 addressed to Wiesjahn, Rachel and Sand, Annalisa, Wiesjahn,
23 Rachel and Wiesjahn, Judd, and Wiesjahn, Rachel were
24 undeliverable why weren't others identically addressed equally
25 undeliverable? Those facts undercut the reliability that I

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1 might otherwise have in drawing inferences when mail isn't
2 returned.

3 The odds of a screwup were magnified by the
4 transposition of the name Martin Stanley to Stanley Martin,
5 followed by "Law Offices of", putting Mr. Stanley's name only
6 as the third name in the list. The insertion into the mailing
7 labels of the names of people not located at 137 Bay Street,
8 Unit #2 without also saying "care of" and the fact that the
9 mail was supposed to go into one of sixteen mailboxes all next
10 to each other, as in an apartment building, as compared and
11 contrasted, for instance, to dropping off mail at physically
12 distinct buildings or even physically distinct suites. In that
13 connection I assume that it's not uncommon for mailing labels
14 to show last names first and to use expressions like "Law
15 Office of" after a name and even, possibly, after a transposed
16 name, even though I would think that best practices would call
17 for reordering the names shown on address labels to correspond
18 to more typical usage. And I'd be surprised in this day and
19 age if computers are incapable of doing so. And I'd also
20 assume that many, if not most, employees of the U.S. Post
21 Office would read the entire label, figure out what happened
22 and reason what the appropriate addressees should be and then
23 get the mail delivered to the right address.

24 But the combination of all of these factors here
25 together causes me to be uncomfortable with the presumption of

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1 delivery, assuming that Motors Liquidation could otherwise rely
2 on it, and when balanced against testimony that I find to be
3 truthful that the mailings weren't received the evidence I
4 heard from the Motors Liquidation side is insufficient to trump
5 the testimony to the contrary.

6 In light of that I don't need to decide whether Motors
7 Liquidation is entitled to the presumption of delivery upon
8 mailing in the first place. I found Ms. Ferrante's testimony
9 to be fully credible as well, and, to the extent it matters,
10 I'll add that I found her to be very competent and
11 knowledgeable as to her business and the employees she
12 supervised. But with that said she did not have, by her own
13 admission, knowledge of the specifics of over a million
14 mailings, and she had to rely on statements by subordinates and
15 entries in her computer system that were hearsay or that could
16 strongly be argued to be such.

17 Best practices would suggest bringing in the person
18 who actually did the mailing whenever testimony is required,
19 laying a foundation for reliance on information in computer
20 databases, using Federal Rules of Evidence 8036 and 902(11) to
21 help do so, introducing more robust testimony as to patterns
22 and practices and crafting affidavits of service when they use
23 the words "caused to be mailed," to be drafted in a less
24 ambiguous way with respect to whether the person who caused the
25 mailing to be mailed actually was the one who dropped it off in

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1 the mailbox or in the post office.

2 I also think that best practices would call for at
3 least some review of the quality of the address data that's
4 transmitted to claims agents or that the claims agents let go
5 out the door, because I've seen, in this case and others, where
6 cryptic abbreviations or a computer's presentation of
7 information in the way they arrange it or truncate it
8 materially increased the risks that mail won't properly arrive.

9 But there's a big difference, of course, between best
10 practices and that which is required to meet minimum standards
11 of persuasiveness. And here I don't need to make a finding as
12 to whether mailing of the bar date notice was satisfactorily
13 proven, as my problem isn't so much with respect to the fact of
14 mailing as it is with my lack of confidence under the
15 particular facts presented to me here that bar date notices
16 that were, in fact, mailed actually found their way into the
17 Law Offices of Martin Stanley mailbox. The presumption of
18 delivery is still rebuttable in those rare cases like this one
19 where denial coupled with extrinsic facts is so strong in
20 rebutting the presumption.

21 To repeat, and for the avoidance of doubt, my concern
22 arises because of my assumption, for the sake of analysis, that
23 the mail did go out but my many doubts as to whether the
24 mailing, once it went out, found its way to the recipient.

25 Finally, I agree with Old GM that floodgate concerns

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1 are a very major concern in Chapter 11 cases and easily satisfy
2 the prejudice requirement when estate representatives are
3 opposing late-filed proofs of claim. See, for example, Judge
4 Gonzalez's decision in In re Creditors Recovery Corp., 370 B.R.
5 90, 109 (Bankr. S.D.N.Y. 2007). I frequently noted this in
6 denying leave to file late claims, though in oral decisions
7 that haven't found their way into print or into electronic
8 publication. But here the floodgate concerns aren't very
9 strong as the facts here do, indeed, give rise to the "perfect
10 storm". It will be difficult, if not impossible, for other
11 claimants to put together a similar factual picture, or,
12 indeed, anything close. Floodgate concerns just aren't a
13 material factor here.

14 In my view the creditors' reasons for its delay and
15 the prejudice to the debtor, the two factors I just discussed,
16 are the most important of the Pioneer factors. The third
17 factor, the time between learning of the bar date and the
18 filing of the motion, which here is a few months, is,
19 essentially, a nonfactor, as it's been satisfactorily explained
20 and is not particularly long.

21 The last two Pioneer factors, based on assumptions I
22 can and do make, are now insufficient to trump the conclusions
23 that would result from the first two, though if the facts
24 relevant to them were otherwise they could. There will be
25 no material delay in judicial proceedings, as the claims will

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1 be going to ADR and they're not likely to have a material
2 effect on the distributions to the other creditors, especially
3 given the facts underlying the merits of the claim, which
4 include one or more drunken drivers whose conduct may well be
5 found to have had much more of an effect on the underlying
6 accident than Old GM's manufacture of the vehicle. And if, as
7 I expect, Mr. Stanley participates as he should in the ADR I'll
8 have no reason to doubt the last factor, whether the creditor
9 has acted in good faith. Of course, given how close this
10 decision is, if either of the latter two assumptions upon which
11 I've here ruled turns out not to be true Old GM has leave to
12 file a motion for reconsideration of this determination.

13 Accordingly, after considering the evidence and the
14 Pioneer factors, I find the requisite excusable neglect and
15 will permit the late filing of the proofs of claim. Mr.
16 Stanley and his clients well then go into the ADR procedures
17 that were previously set up for other products liability
18 claimants in this case.

19 If they do not participate, or if they do not
20 participate in good faith that will call into question the
21 premises upon which I issued this ruling and Old GM will be
22 permitted to file a motion to reconsider.

23 You're to try to agree upon a form of order
24 implementing this discernmination (sic) without prejudice to
25 either side's right to appeal. If you cannot agree upon a

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1 mutually satisfactory form of order that faithfully implements
2 this ruling, any part of it, including the leave to reconsider
3 it, either side may settle an order on no less than two
4 business days notice by hand, fax or e-mail, or an extra two
5 weeks if traditional U.S. mail is to be used.

6 We're adjourned.

7 (Whereupon these proceedings were concluded at 12:22 PM)

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2 I N D E X

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4 RULINGS

	Page	Line
6 Granting of Motion to File Proof of Claim	12	15
7 After Claims Bar Date by Judd Wiesjahn and		
8 Annalisa Sand		

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2 C E R T I F I C A T I O N

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4 I, Hana Copperman, certify that the foregoing transcript is a
5 true and accurate record of the proceedings.

6

Hana
Copperman

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17 Date: July 29, 2011

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